

No. 50421-9-II

**COURT OF APPEALS, DIVISION II**  
**STATE OF WASHINGTON**

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STATE OF WASHINGTON, Respondent,

v.

BINIAM YIRGALEM GEBREMARIEM, Appellant.

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Appeal from the Superior Court of Lewis County  
The Honorable James Lawler  
No. 16-1-00637-21

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**BRIEF OF APPELLANT**  
**BINIAM GEBREMARIEM**

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## **I. ASSIGNMENTS OF ERROR**

1. Allowing the defendant to waive his right to counsel without a knowing, intelligent, and voluntary waiver, was error.
2. Denying the constitutional rights to due process, confronting witnesses, and a fair trial by failing to appoint a certified or qualified interpreter, was error.
3. Allowing the defendant to waive his right to a jury trial, without a knowing, intelligent, and voluntary waiver, was error.
4. The conviction for manufacturing marijuana, without sufficient evidence, was error.
5. The imposition of legal financial obligations, without adequately taking into consideration the defendant's ability to pay, was error.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Does a defendant, whose competency has been questioned, who is not from this country, and whose primary language is not English make a knowing, intelligent, and voluntary waiver of their right to counsel when they waive their right to counsel without the court inquiring into the reasons for

waiving the right to counsel, the defendant's ability to represent himself, and after only a brief discussion about the disadvantages of representing himself?

2. Are a defendant's constitutional rights to due process, to confront witnesses, and to a fair trial violated when English is not the defendant's first language and the court provides an interpreter via the language line, over the phone, but does not ask the interpreter his/her name, qualifications, or require the interpreter to take an oath, and where the court makes no findings that the interpreter is certified or qualified, and when the defendant challenges the interpreters qualifications, the court denies the defendant the use of interpreter?
3. Does a defendant, whose competency has been questioned, who is not from this country, and whose primary language is not English make a knowing, intelligent, and voluntary waiver of their right to a jury trial when they waive their right to a jury trial without an interpreter and without counsel, after a brief colloquy about the right to a jury trial?
4. Is there sufficient evidence to convict a defendant of manufacturing marijuana based solely on evidence that the defendant was present and staying in a residence where

marijuana was being manufactured, with no evidence that the residence belonged to the defendant, no fingerprints on items related to the manufacture of marijuana, and evidence tying the defendant directly to the manufacturing of marijuana?

5. May a trial court impose discretionary legal financial obligations for an indigent defendant after only inquiring if the defendant has the ability to work?

### **III. STATEMENT OF THE CASE**

Gebremariam represented himself and was convicted, after a bench trial, of one count manufacture of marijuana. RP 196. He appeals his conviction.

#### **1. Interpreter.**

English is not Gebremariam's first language; he is from the country of Eritrea and speaks Tigrinya. RP 11-17-16 at 7. He requested an interpreter. RP 11-17-16 at 6.

There was no interpreter at the hearing on November 17, 2016, where the court found Gebremariam competent, allowed him to proceed pro se, and arraigned him. RP 11-17-16 at 2-14.

On December 22, 2016, at the omnibus hearing, the court provided an interpreter via telephone. RP 12-22-16 at 2. Gebremariam questioned

the interpreter regarding his qualifications, until the court cut him off. RP 12-22-16 at 3-8. Gebremariam said the interpreter was not accurately interpreting. RP 12-22-16 at 8.

THE DEFENDANT: He's not interpreting it perfectly accurately. He's not.

THE COURT: Well, this is the interpreter we're using. If you wish to provide your own interpreter, you can do that at your cost.

THE DEFENDANT: I --

THE COURT: These are people that we deal with on a weekly basis. They provide certified interpreters. If you want to argue with the interpreter, then you can bring your own interpreter at your cost.

THE DEFENDANT: It's not about arguing. If I don't bring my own --

THE COURT: Yes, it is about --

THE DEFENDANT: If he don't interpret my thoughts perfectly or accurately.

THE COURT: All right. Mr. --

THE DEFENDANT: And the same thing if he don't bring your words to me or his words to me accurately, how I gonna...

RP 12-22-16 at 8.

Gebremariam continued to question the interpreter. RP 12-22-16 at 9. The court said, "Stop right now or you're going to be visiting our jail." RP 12-22-16 at 9. The first interpreter hung up; another one was called.



RP 12-22-16 at 11-12. The court warned Gebremariam:

I'm going to give you one more chance to follow this procedure, and if you don't, I'll have no choice but to find you in contempt. This is exactly what happened in front of Judge Lawler the last time you were in court. You don't have a right to challenge the interpreter for not being good enough for you.

So if you want to visit the jail, start talking again. If you would prefer not to visit the jail, we're going to do this procedure. We'll hang up and we'll do this procedure without the interpreter. And pretty soon we're going to get into a contempt situation.

RP 12-22-16 at 12.

Gebremariam again complained that the interpreter was not interpreting correctly and that the interpreter could not understand him.

RP 12-22-16 at 15. The court then proceeded without an interpreter; Gebremariam continued to request an interpreter and state that he did not understand what was happening. RP 12-22-16 at 15-17. The court asked Gebremariam to sign the order; he said he did not understand and then was held in contempt and taken in to custody. PR 12-22-16 at 17-18. An interpreter was not provided at any other hearings or the trial in this case.

## 2. Waiver of Counsel.

Counsel was appointed to represent Gebremariam. RP 11-17-16 at 2, CP 13. Counsel requested a competency evaluation; Gebremariam was found competent. RP 11-17-16 2, CP 8-12, 14-20. Gebremarien then

requested to represent himself. RP 11-17-16 at 2-9.

THE COURT: All right. Let's talk about that then. Mr. Gebremariam, do you want to represent yourself on this case?

MR. GEBREMARIEM: Yeah. I'm present, sir.

THE COURT: I understand --

MR. GEBREMARIEM: Yes, sir.

THE COURT: -- but saying you're present doesn't answer my question. Do you want to represent yourself?

MR. GEBREMARIEM: I'm here, yeah. I'm present, sir, yeah. I present, yeah.

THE COURT: This is -- you're still not answering my question. So you told me that you do not want Mr. Arcuri to represent you; is that right?

MR. GEBREMARIEM: I don't -- yeah, I don't want him. I don't -- I don't need attorney.

THE COURT: Okay. So you don't need an attorney at all; is that correct?

MR. GEBREMARIEM: Yes, that's right.

THE COURT: All right. So that means you want to represent yourself? You want to be your own attorney?

MR. GEBREMARIEM: Yeah.

THE COURT: Yes?

MR. GEBREMARIEM: Yes.

RP 11-17-16 at 4-5.

Without an interpreter present, the court discussed the disadvantage of proceeding without an attorney:

THE COURT: All right. So since you're representing yourself, want to represent yourself, I want to make sure that you understand that there are some real disadvantages to representing yourself because you have to understand the rules of evidence, on how to present a case, how to present evidence. Are you familiar with any of those things?

MR. GEBREMARIEM: I'm familiar. If not, I will request some -- I will just -- yeah, I'll request some other person to just help me with finding the process. But I'm confident to defend myself.

RP 11-17-16 at 7.

The court offered to appoint standby counsel, but Gebremariam said he would find someone himself. RP 11-17-16 at 8. The court advised him that person must be an attorney. RP 11-17-16 at 8-9. The court allowed Gebremariam to proceed pro se and did not appoint standby counsel. RP 11-17-16 at 9.

On January 19, 2017, again without an interpreter, the court discussed Gebremariam proceeding pro se.

THE COURT: . . . Mr. Gebremariam, I know that you've been advised in the past about your constitutional right to have an attorney represent you. I would strongly urge you to do that. If you can't afford an attorney, one will be appointed for you.

. . .

MR. GEBREMARIEM: I mean, I would like to have one,

but I would like to know what kind of lawyer I'm using with this building. So I will just go get one attorney which is licensed, the one that I know.

...

MR. GEBREMARIEM: I'm okay. But if I need one maybe, at which time I might, yeah, I might get one.  
But for now --

THE COURT: For now you don't want an attorney?

MR. GEBREMARIEM: Yeah.

RP 1-19-17 at 5-6.

3. Jury Trial Waiver.

On February 9, 2017, Gebremariam asked to have a trial “by courts” or “by judge.” RP 2-9-17 at 19. This hearing took place without counsel and without an interpreter.

THE COURT: Okay. All right. So you understand you have a constitutional right to have your case heard by a jury of twelve Lewis County citizens? You understand that, right?

MR. GEBREMARIEM: I don't understand. I understand you're the judge --

THE COURT: Well, it is a constitutional right that you have. But if you are telling me you want to waive that right and have your case heard by a judge, I can do that.

MR. GEBREMARIEM: Yes. Yeah. I would like it to be by the judge.

THE COURT: Okay. We will do that. So we will set it for a bench trial.

MR. GEBREMARIEM: Yeah. I got to have my freedom, you know.

THE COURT: Okay.

MR. GEBREMARIEM: I just want a judge to be sitting on.

RP 2-9-17 at 21.

On the day of trial, the court discussed the disadvantages of waiving a jury trial; Gebremariam again said he wanted to waive his right to a jury trial and said, "That's why I choose that because the judge [unintelligible] freedom." RP 2-27-17 at 9-10. He also signed a waiver to trial by jury, but crossed out defendant and wrote "accused," and wrote "UCC 1-308 all rights reserved without prejudice" on the bottom. CP 104.

#### 4. Facts.

On October 25, 2016, around 2:00 p.m., police were called to assist Lewis County PUD with shutting off power to a residence. RP 2-27-17 at 41-42. The PUD employees entered the property and the police followed. RP 2-27-17 at 42. The police went to the door and saw pesticides, potting material, a small marijuana plant, and smelled the odor of marijuana. RP 2-27-17 at 42-43. The police knocked several times before Gebremariam answered; he looked like he had just woken up. RP 2-27-17 at 43-44. When he answered the door, the police could see several marijuana plants hanging inside the residence. RP 2-27-17 at 44.

The police asked Gebremariam if he lived there; he said he didn't, he arrived a week before to do work on the property, and would be there until Christmas. RP 2-27-17 at 45, 88. Upon clarification, he said he was there to clean the property. RP 2-27-17 at 88.

Q So you just said that I say to you I was working. Did I mention any what did I work on that place?

A No. I asked you why you were there, --

Q Mm-hmm.

A -- how long you had been there.

Q Okay.

A You said you arrived about a week earlier and that you were there to do work on the property.

Q Work. Did I mention what kind of -- I mean, is it work related to the marijuana or...?

A No, you didn't specifically say that. You said you were there to do work on the property.

Q Work on the property. Okay. But to clarify, on here your testimony you say that -- you say he was cleaning up the property, no work, but cleaning the property. Just....

A Cleaning or working on the property. I think that's one and the same.

RP 2-27-77 at 88.

The police testified that Gebremariam told him to talk to Mike and invited him into the residence while he got his cell phone and Mike's

number. RP 2-27-17 at 46. Gebremariam testified that he told the police that he lived in Seattle, it was his friend's house, he was just visiting, and he'd only been there a week, going back and forth to his house in Seattle. RP 2-27-17 at 182-85.

The officer went outside, called Mike, and then asked for permission to search the house; Gebremariam said no. RP 2-27-17 at 47. Gebremariam asked to use the bathroom, officer followed him into the house, made additional observations regarding a marijuana grown, then called for backup. RP 2-27-17 at 48. The officer then detained and handcuffed Gebremariam and called for a search warrant. RP 2-27-17 at 49. There were over 300 marijuana plants, and other evidence of manufacturing recovered. RP 2-27-17 at 23-24, 147, 165. The police did not see and were not provided any authorization to grow marijuana. RP 2-27-17 at 62-63, 102.

Gebremariam told the police that he didn't know anything about the marijuana grow. RP 2-27-17 at 98. He testified that he knew there were plants in the house, but not that they were marijuana. RP 2-27-17 at 186.

The court found Gebremariam guilty. RP 2-27-17 at 196. The court found that it was obviously a marijuana grow. RP 2-27-17 at 196.

So with regard to knowledge of whether he -- whether the

defendant knowingly was involved in this, knowingly manufactured the marijuana, I can look at direct evidence and I can look at circumstantial evidence. The evidence is that Mr. Gebremariam was present at the house. There was a bedroom at the house where he had been staying. And there was the credit card or debit card that was found in that room which corroborates that testimony, indicates that he was there. You combine that with the fact that he had the key to his car and the key to the shop, he had both of those, that indicates that he had access to that shop where there was growing going on. So I take all of those things together and that is sufficient evidence for me to find that he knowingly manufactured the marijuana.

RP 2-27-17 at 197.

#### IV. ARGUMENT

1. Gebremariam Did Not Knowingly, Intelligently, and Voluntarily Waive His Right to Counsel.

A trial court must determine that the defendant is competent and is making a knowing, intelligent, and voluntary waiver of their right to counsel before allowing a defendant to proceed without the assistance of counsel. *State v. Imus*, 37 Wash. App. 170, 173–74, 679 P.2d 376, 378–79 (1984); citing *Faretta v. California*, 422 U.S. 806, 821, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22 (amend. 10).

Prior to accepting a waiver of counsel, the court must inform the defendant of the dangers and disadvantages of self-representation so that the record will establish that “he knows what he is doing and his choice is made with eyes open.” The defendant must also be subjected to a penetrating and comprehensive examination by the court to



determine the subjective reasons behind the refusal to accept counsel.

*State v. Dougherty*, 33 Wash. App. 466, 469, 655 P.2d 1187 (1982), quoting *Faretta*, 422 U.S. 835, 95 S.Ct. 2541, citing *State v. Chavis*, 31 Wash.App. 784, 790, 644 P.2d 1202 (1982).

In *Dougherty*, the appellate court found that Dougherty had not validly waived his right to counsel because he had not been informed of the dangers of self-representation and the trial court's inquiry into Dougherty's ability to represent himself and the reasons behind his request were limited to Dougherty's statement that he was not unfamiliar with the law. *Dougherty*, 33 Wash. App. at 469.

The validity of a defendant's waiver of counsel is an issue which depends upon the particular facts and circumstances of each case. *See Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461, (1938). Factors such as a defendant's intelligence and illiteracy are factors a court may consider. *Imus*, 37 Wash. App. at 177.

In this case, English was not Gebremariam's first language; although he was able to communicate in English, there were obvious language barriers and no interpreter was provided at the hearings where he waived his right to counsel. A competency evaluation was ordered due to concerns regarding his competency; he was found competent.

Gebremariam is not from this country, and therefore, may not have been familiar with our criminal justice system.

Most importantly, from the colloquy between the court and Gebremariam, he did not understand what it meant to waive his right to an attorney or the disadvantages of representing himself. At the first hearing, Gebremariam repeatedly said "I'm present" when asked if wanted to represent himself. Gebremariam said he wanted to represent himself, and the trial court granted that request, without any conversation about the reasons why he wanted to represent himself, his ability to represent himself, or any discussion of the disadvantages of representing himself.

At the second hearing, the court went over the disadvantages of not having an attorney with Gebremariam once, briefly:

THE COURT: All right. So since you're representing yourself, want to represent yourself, I want to make sure that you understand that there are some real disadvantages to representing yourself because you have to understand the rules of evidence, on how to present a case, how to present evidence. Are you familiar with any of those things?

MR. GEBREMARIEM: I'm familiar. If not, I will request some -- I will just -- yeah, I'll request some other person to just help me with finding the process. But I'm confident to defend myself.

RP 11-17-16 at 7. Gebremariam said that he would find someone to help him. There was no further conversation about the disadvantages of representing himself, and no discussion of his ability to represent himself

or the reasons why he wanted to represent himself.

Also, after the court discussed the disadvantages and asked Gebremariam if he wanted to represent himself, his request was equivocal, “I mean, I would like to have one [an attorney], but I would like to know what kind of lawyer I’m using with this building. So I will just go get one attorney which is licensed, the one that I know.” RP 1-19-17 at 5-6.

Gebremariam did not knowingly, intelligently, and voluntarily waive his right to counsel. It is clear that there was a language barrier, no interpreter was used, there was a very brief explanation of the disadvantages of representing himself, there was no discussion of his ability to represent himself or the reasons why he wanted to represent himself, and there was no discussion of our criminal justice system and any cultural differences between the United States and Eritrea<sup>1</sup>. The record does not establish that Gebremariam understood his right to counsel or the disadvantages of not having an attorney; therefore, he could not make a knowing, intelligent, and voluntary waiver of his right to counsel.

2. Gebremariam’s Constitutional Rights to Due Process and to Confront Witnesses Were Violated When the Trial Court Improperly Denied Him a Certified or Qualified Interpreter.

A defendant has a constitutional right to an interpreter. In Washington, “the right of a defendant in a criminal case to have an

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<sup>1</sup> Eritrea is a country in northeast Africa, near the Middle East.

interpreter is based upon the Sixth Amendment constitutional right to confront witnesses and 'the right inherent in a fair trial to be present at one's own trial.'" *State v. Gonzales-Morales*, 138 Wash.2d 374, 379, 979 P.2d 826 (1999); U.S. CONST. amend. V, VI, XIV; WASH. CONST. Art. I, §§ 3, 22. A trial court's denial of an interpreter is reviewed for abuse of discretion. *Gonzales-Morales*, 138 Wash.2d at 381-82.

A defendant has a right to a competent interpreter. *State v. Teshome*, 122 Wash. App. 705, 711, 94 P.3d 1004 (2004). The court must appoint a certified or qualified interpreter for non-English speaking defendants. RCW 2.43.030. If the court finds that a certified interpreter is not reasonably available, the court may appoint a qualified interpreter. RCW 2.43.030(1)(b).

If good cause is found for using an interpreter who is not certified or if a qualified interpreter is appointed, the appointing authority shall make a preliminary determination, on the basis of testimony or stated needs of the non-English-speaking person, that the proposed interpreter is able to interpret accurately all communications to and from such person in that particular proceeding. The appointing authority shall satisfy itself on the record that the proposed interpreter:

(a) Is capable of communicating effectively with the court or agency and the person for whom the interpreter would interpret; and

(b) Has read, understands, and will abide by the code of ethics for language interpreters established by court rules.

RCW 2.43.030(2). Furthermore, the court must have the interpreter state their name and qualifications on the record, and take an oath “that the interpreter will make a true interpretation to the person being examined of all the proceedings in a language which the person understands, and that the interpreter will repeat the statements of the person being examined to the court or agency conducting the proceedings, in the English language, to the best of the interpreter's skill and judgment.” RCW 2.43.050.

The right to an interpreter may only be waived if the defendant requests a waiver and the court finds that the waiver has been made knowingly, voluntarily, and intelligently. RCW 2.43.060.

In this case, the interpreters were not identified by name, the court did not inquire or making any findings about whether they were certified or qualified, the court asked no questions about their qualifications, and the court did not require that they take an oath<sup>2</sup>. Also, the interpreters appeared by phone only; they were not present in court. Gebremariam questioned the interpreter regarding their qualifications, said that the interpreter was not interpreting accurately, and the court repeatedly told Gebremariam if he did not like the interpreter, he could provide one at his

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<sup>2</sup> There is one Tigrinya certified interpreter listed on the Washington Courts website Yoseph Teklemariam, in Seattle.  
[https://www.courts.wa.gov/programs\\_orgs/pos\\_interpret/index.cfm?fa=pos\\_interpret.searchresult](https://www.courts.wa.gov/programs_orgs/pos_interpret/index.cfm?fa=pos_interpret.searchresult)

own cost. The court repeatedly threatened to hold Gebremariam in contempt and put him in jail if he did not proceed.

You don't have a right to challenge the interpreter for not being good enough for you. So if you want to visit the jail, start talking again. If you would prefer not to visit the jail, we're going to do this procedure. We'll hang up and we'll do this procedure without the interpreter. And pretty soon we're going to get into a contempt situation.

RP 12-22-16 at 12. Ultimately, the court did just that, held Gebremariam in contempt and put him in jail during the omnibus hearing. RP 12-22-16 at 16-17. The court did not provide an interpreter for any future hearings or during the trial. The court did not make any findings that Gebremariam did not need an interpreter or that he knowingly, voluntarily, and intelligently waived his right to an interpreter. For all the above reasons, the trial court abused its discretion by failing to appoint a certified or qualified interpreter. Gebremariam was denied his constitutional right to confront witnesses and to a fair trial; therefore, this court should reverse and remand for a new trial.

3. Gebremariam Did Not Knowingly, Intelligently, and Voluntarily Waive His Right to a Jury Trial.

A defendant in a criminal case has a constitutional right to a jury trial. *Pasco v. Mace*, 98 Wash.2d 87, 653 P.2d 618 (1982); U.S. CONST. amend. VI, XIV; WASH. CONST. Art. I, § 22. A waiver of that right must be knowingly, intelligently, and voluntarily. *Bellevue v. Acrey*, 103

Wash.2d 203, 207, 691 P.2d 957 (1984). When reviewing a waiver of the right to a jury trial, appellate courts consider whether the defendant was advised of his constitutional right to a jury trial and the facts and circumstances surrounding the waiver, including the experience and capabilities of the accused. *State v. Ramirez-Dominguez*, 140 Wash.App. 233, 165 P.3d 391 (2007), citing *City of Seattle v. Williams*, 101 Wash.2d 445, 451, 680 P.2d 1051 (1984), *State v. Downs*, 36 Wash.App. 143, 145, 672 P.2d 416 (1983). “[E]very reasonable presumption should be indulged against the waiver ... absent an adequate record to the contrary.” *State v. Wicke*, 91 Wash.2d 638, 645, 591 P.2d 452 (1979).

A defendant’s waiver of his right to a jury trial is reviewed de novo. *State v. Ramirez-Dominguez*, 140 Wash.App. 233, 165 P.3d 391 (2007), citing *State v. Treat*, 109 Wash.App. 419, 427, 35 P.3d 1192 (2001).

In this case, Gebremariam waived his right to a jury trial without an interpreter or the assistance of counsel. When the trial court explained that he had a constitutional right to a jury trial, he responded, “I don’t understand. I understand you’re the judge – .” RP 2-9-17 at 21. He then said he “would like to be by the judge,” “I got to have my freedom, you know.” RP 2-9-17 at 21. Later, he signed a written waiver, and said, “That’s why I choose that because the judge [unintelligible]

freedom.” RP 2-27-17 at 9-10; CP 104. Given the language and cultural barriers, the lack of interpreter, lack of attorney, and brief colloquy regarding waiving his right a jury trial, the record does not establish that there was a knowing, intelligent, and voluntary waiver of the right to a jury trial. Therefore, this court should reverse and remand for a new trial.

4. There Was Insufficient Evidence to Convict Gebremariam of Manufacturing Marijuana.

“The standard for determining whether a conviction rests on insufficient evidence is ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011) (internal citations omitted). “The due process clause of the fourteenth amendment to the United States Constitution requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged.” *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983); U.S. CONST. amend. XIV.

In this case, the State had the burden to prove beyond a reasonable doubt that Gebremariam manufactured marijuana. RCW 69.50.401.

“Manufacture” means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin, or



independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.

RCW 69.50.010(v).

A defendant's mere presence at the scene, even with knowledge of the criminal activity, does not establish accomplice liability. *In re Welfare of Wilson*, 91 Wash.2d 487, 491, 588 P.2d 1161 (1979). In *Olson*, the court found that there was sufficient evidence that Olson was involved in manufacturing of marijuana where although he did not own the property, he had a key, his fingerprints were on several items involved in manufacturing marijuana, and he admitted he owned a trailer on the property. *State v. Olson*, 73 Wash. App. 348, 358, 869 P.2d 110, 116 (1994). In *Enlow*, the court held there was insufficient evidence of manufacturing methamphetamine where Enlow was found hiding in the bed of a truck, he was not the registered owner, his fingerprints were found on some items in the truck, but not on any of the items related to the manufacture of methamphetamine. *State v. Enlow*, 143 Wash. App. 463, 467-69, 178 P.3d 366 (2008).

In this case, there was no evidence presented regarding who owned or rented the residence. There were no fingerprints taken to show whether Gebremariam had touched any of the items related to the manufacture of

marijuana. The evidence showed that Gebremariam was the only person at the residence at the time the police arrived, and he may have been staying at the residence. However, his presence alone does not show that he is the person who grew, harvested, packaged, or in any way manufactured the marijuana in the residence. Therefore, there was insufficient evidence to convict Gebremariam of manufacturing marijuana; the conviction should be reversed and dismissed.

5. The Trial Court Improperly Imposed Legal Financial Obligations Without Adequately Taking Into Consideration Gebremariam's Ability to Pay.

A trial court must inquire about a defendant's ability to pay before imposing legal financial obligations (LFOs).

RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

*State v. Blazina*, 182 Wn.2d 827, 301 P.3d 492 344 P.3d 680, 686 (2015).

Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. GR 34. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (comment listing facts that prove indigent

status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, *see id.*, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.

*Id.* at 838-39.

In this case, Gebremariam was found indigent for purposes of trial and this appeal. CP 13, 127-34. At sentencing, the court's inquiry into Gebremariam's ability to pay was limited to whether he had the ability to work:

THE COURT: . . . With regard to the legal financial obligations, do you have the ability to work and have a job?

MR. GEBREMARIEM: I do work. Yeah, I do work.

THE COURT: If you're not in custody?

MR. GEBREMARIEM: Yeah, I do, yeah.

THE COURT: Okay. So I'll find that you have the ability to pay the legal financial obligations. I'll impose those as requested: \$500 crime victim assessment, \$200 filing fee, \$1,000 VUCSA fine, \$100 lab fee, and \$100 DNA fee, monthly payments of \$25 a month starting – or more starting 60 days after release.

RP 2-28-17 at 207. Gebremariam stated, "I don't know if I have to keep working on the same work I'm doing because I'm going to stay away from them. So when I get out [of jail], I might struggle to find a job." RP 2-28-

17 at 208. Nonetheless, the court imposed \$1,900 in legal financial obligations. RP 2-28-17 at 207.

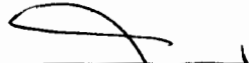
Given that Gebremariam was found indigent, the presumption is that he cannot pay legal financial obligations. Furthermore, while he stated he had worked and was able to work, the court did not inquire into how much he made, his debts, other expenses, and did not consider any difficulty in finding a new job after his felony conviction and his release from jail. Therefore, the trial court erred in imposing legal financial obligations without adequately considering his ability to pay.

#### **V. CONCLUSION**

In conclusion, there was insufficient evidence that Gebremariam manufactured evidence; that charge should be reversed and dismissed. In addition, the trial court erred by allowing Gebremariam to waive his right to counsel and a jury trial without a knowing, intelligent, and voluntary waiver, and improperly denied an interpreter. For all these reasons, Gebremariam did not receive a fair trial and this matter should be reversed and remanded for a new trial, if this court does not reverse and dismiss for insufficient evidence. Furthermore, the trial court imposed discretionary legal financial obligations without making an adequate inquiry into Gebremariam's ability to pay.

Dated this 5<sup>th</sup> day of September, 2017.

Respectfully Submitted,



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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

BINIAM GEBREMARIEM,

Appellant.

NO. 50421-9-II

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The undersigned certifies that on this day correct copies of this appellant's brief were delivered electronically to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

  
Signed September 5, 2017 at Tacoma, Washington.

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